Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

No. 75-1726

TERRELL DON HUTTO, COMMISSIONER,
ARKANSAS DEPARTMENT OF CORRECTION ..... *Petitioner*

vs.

ANDREW JACKSON ROSS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ANDREW JACKSON ROSS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Terrell Don Hutto prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 16, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The opinion of the District Court for the Western District of Arkansas is reported at 394 F. Supp. 1219 (1975). The opinion of the Arkansas Supreme Court is reported at 514 S.W.2d 409 (Ark. 1974).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 16, 1976. A timely Motion

for a rehearing *en banc* was denied on April 5, 1976, and this petition for certiorari was filed within ninety days. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

WHETHER A STATEMENT MADE SUBSEQUENT TO AN AGREED UPON PLEA BARGAIN THE CONTINUED VALIDITY OF WHICH IS NOT CONDITIONED UPON THE GIVING OF THE STATEMENT, IS INVOLUNTARY AND INADMISSIBLE UNDER THE TOTALITY OF THE CIRCUMSTANCES?

CONSTITUTIONAL PROVISIONS

I

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

II

ARTICLE I OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent, Andrew Jackson Ross, while Treasurer of Pope County, Arkansas, was charged on March 14, 1972, with 86 counts of converting, using and embezzling public funds.

The respondent, his counsel, and the prosecuting attorney entered into plea negotiations and an agreement was reached in September, 1972. The respondent agreed to enter a plea of guilty in return for the prosecutor's recommending a fifteen year sentence with ten years suspended. At least a week and maybe two weeks after the agreement was reached the prosecuting attorney asked respondent's counsel if the respondent would give a statement concerning the crimes. (Federal Transcript 20. References to the federal court transcript will be shown as F.T. and to the state court trial transcript as S.T.)

Prior to giving the statement the respondent was informed that he could refuse to make the statement and still receive the benefit of the plea bargain. (F.T. 30) The respondent was given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), prior to making the statement (F.T. 37-38) and his attorney was present during the giving of the statement. (S.T. 535) Subsequently, the respondent withdrew from the plea bargain, changed attorneys, and demanded a jury trial. After a trial by jury

the appellant was found guilty and the jury recommended a sentence of twenty-one years.

The respondent appealed his conviction to the Arkansas Supreme Court and the conviction was affirmed. *Ross v. State,* 257 Ark. 44, 514 S.W.2d 409 (1974). A petition for a writ of certiorari was denied by this Court on April 21, 1975. *Ross v. Arkansas,* No. 74-1087.

The respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Arkansas, Fort Smith Division, again challenging the admissibility of his confession. An evidentiary hearing was held on May 15, 1975, at which the respondent did not testify. On May 23, 1975, the Honorable Paul X. Williams denied the petition. *Mobley ex rel. Ross v. Meek,* 394 F. Supp. 1219 (1975).

The United States Court of Appeals for the Eighth Circuit granted the respondent's application for a certificate of probable cause. The decision of the United States District Court was reversed by the Eighth Circuit on March 16, 1976, and an order was entered vacating respondent's state conviction for the crime of embezzling public funds. The Court of Appeals held ". . . that the confession was given as a result of the plea bargain and was therefore involuntary under . . . all the circumstances."

The petitioner Terrell Don Hutto has been substituted as a party in place of Donald L. Meek, since at the time of the decision of the Court of Appeals, petitioner Hutto, as Commissioner of the Arkansas Department of Correction, had custody of respondent Ross. The petitioner was substituted as a party by Order of the United States District Court for the Western District of Arkansas.

ARGUMENT FOR ALLOWING THE WRIT

WHETHER A STATEMENT MADE SUBSEQUENT TO AN AGREED UPON PLEA BARGAIN, THE CONTINUED VALIDITY OF WHICH IS NOT CONDITIONED UPON THE GIVING OF THE STATEMENT, IS INVOLUNTARY AND INADMISSIBLE UNDER THE TOTALITY OF THE CIRCUMSTANCES?

The petitioner asks this Court to review the decision of the Court of Appeals for the Eighth Circuit since that Court improperly found an implied promise of leniency a finding unsupported by the evidence. The decision that the confession was involuntary as a matter of law is clearly a misinterpretation of this Court's decision.

The petitioner respectfully contends that the decision of the Court of Appeals is based upon policy and not sound constitutional precepts. It is submitted that the Court of Appeals did not properly apply the "totality of circumstances" test to determine voluntariness but merely looked at isolated facts. *Boulden v. Holman,* 394 U.S. 478 (1969). This Court has stated with respect to voluntariness that the test should be the following:

> "Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961).

The petitioner realizes that:

> ". . . 'A confession, in order to be admissible, must be free and voluntary: That is, . . . not . . . obtained by any

direct or implied promises, however slight. . . .' " *Bram v. United States,* 168 U.S. 532, 542-543 (1897).

The Court of Appeals held that since a plea bargain had been reached, an "implied promise of leniency" existed thereby invalidating the voluntariness of the confession ab initio. It is submitted that this interpretation by the Court of Appeals is not supported by law. This Court in *Shotwell Mfg. Co. v. United States,* 371 U.S. 341, 348 (1963) stated that:

". . . [a] coerced confession claim, whether founded on promise of immunity or otherwise, always involves the governmental conduct complained of 'bring about' a confession 'not freely self-determined' "?

Petitioner submits that the Court of Appeals erred in finding that the confession in this case was a product of the plea bargain and, therefore, inadmissible as a violation of the respondent's right against self-incrimination. The right against self-incrimination is subject to being waived under ". . . procedural safeguards effective to secure the privilege against self-incrimination" and ". . . to insure that the statements were truly the product of a free choice." *Miranda v. Arizona,* 384 U.S. 436, 444 (1966). There is no question that respondent was apprised of the required *Miranda* warnings. Further, the confession was made in the office of respondent's counsel and with his counsel present, which negates any claim of overbearing "custodial interrogation" or of an "incommunicado police-dominated atmosphere," situations found undesirable by this Court. *Miranda,* supra, at 455. The record in this case does not contain any evidence that the giving of the confession was a condition precedent to the continued viability of the plea bargain agreement between the respondent and the

prosecuting attorney. Petitioner's counsel at the time that the confession was given testified that petitioner was expressly informed that he did not have to give the confession in order to retain the benefit of the plea bargain. (F.T. 30) The respondent, while under oath, admitted that at the time he gave the statement it was voluntary and that nothing had been promised him in return for the statement. (S.T. 570) The plea bargain in this case was a fait accompli; the recommendation of sentence was not contingent upon respondent making a statement of any kind, and the recommendation would have been made without the statement being given. Respondent's confession was completely voluntary.

In a habeas corpus petition challenging the admissibility of a confession after a properly conducted hearing pursuant to *Jackson v. Denno,* 378 U.S. 368 (1964), ". . . the burden [is] upon [the] petitioner to establish by convincing evidence that the factual determination by the state court was erroneous." *Fugate v. Gaffeney,* 453 F. 2d 362, 364-365 (8th Cir. 1972), cert. denied 409 U.S. 888 (1972). See, also, *LaVallee v. Delle Rose,* 410 U.S. 690 (1973). The respondent in this case testified neither at the state court *Denno* hearing nor at the federal habeas corpus hearing in district court. Federal habeas corpus is civil in nature, and an adverse inference could properly be drawn from the applicant's silence. ". . . [T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano,* —— U.S. ——, p. 10 of slip opinion issued on April 20, 1976, in case No. 74-1187. The petitioner respectfully submits that the Circuit Court of Appeals disregarded established case law in presuming without any evidentiary support that the

confession was given as a result of the plea bargain. The Court of Appeals should have only ". . . [considered] the undisputed facts in the record to ascertain whether the confession resulted from police coercion or the exercise of petitioner's own free will." *Crooker v. California*, 357 U.S. 433, 435 (1958).

The respondent has not only failed to introduce any evidence showing that the State of Arkansas was at fault in the rescission of the plea bargain, but also the Court record can only support the conclusion that the failure to complete the plea bargain was due solely to the actions of the respondent. The record discloses that the initial plea of guilty was not accepted because an employee of the respondent informed the trial judge the respondent was not sane, whereupon, the trial judge refused to accept the guilty plea and sent the respondent to the Arkansas State Hospital for a determination of his competency to enter a plea of guilty. (S.T. 54-55) The respondent was found competent on October 31, 1972, and the finding was filed of record on the 6th day of November, 1972. (S.T. 59) On the 13th day of November, 1972, respondent began filing motions evidencing his withdrawal from the plea bargain: Motions for Subpoena Duces Tecum and Inspection of Record were filed (S.T. 60 and 61); a motion for a Bill of Particulars was filed November 21, 1972 (S.T. 62); Motions for a Hearing on Mental Competency to Stand Trial and For a Change of Venue was filed March 2, 1973 (S.T. 65 and 67); another Motion for Subpoena Duces Tecum was filed April 23, 1973 (S.T. 96, 97); other pretrial motions were filed by the respondent on the 28th day of June, 1973 (S.T. 122 and 124); and a Motion for Continuance was filed August 27, 1973. The petitioner contends that since the failure to conclude the plea bargain was clearly due to the

actions of the respondent, the Court of Appeals improperly relied upon the failure to execute the bargain as relevant to the determination of the admissibility of the confession.

The petitioner respectfully urges this Court to grant certiorari to determine whether a plea bargain negates the admissibility of a subsequent confession freely given after proper warnings required by *Miranda* and where the benefit of the plea bargain was still available even if the defendant withheld any statement. The petitioner submits that it is highly important to the effective administration of justice for this Court to consider this question. A prosecuting attorney might balk at plea negotiations if any material or inculpatory evidence developed subsequent to those negotiations is inadmissible at trial even if the defendant withdraws from the negotiated plea. Prosecuting attorneys may find their hands tied in many important respects: the exclusion of material and inculpatory evidence disclosed in circumstances of meaningful waiver: and the erosion of the totality of circumstances standard with regard to confessions of the defendant.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Appendix

MOBLEY ex rel. ROSS V. MEEK, No. 75-1611

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT; MARCH 16, 1976.

This appeal from a denial of habeas corpus relief by the district court[1] presents the question of whether a statement and confession made by appellant in connection with a plea bargain in a state criminal action was improperly admitted in appellant's trial in violation of his Fifth Amendment privilege against self-incrimination. We hold that the statement was involuntary under applicable federal standards and therefore reverse. The facts are largely undisputed.

Appellant was convicted by a jury of embezzling public funds and sentenced to custody for 21 years. His conviction was affirmed by the Supreme Court of Arkansas. 514 S.W.2d 409 (Ark. 1974).

During the State's case in chief the State offered in evidence a detailed confession made by appellant after a plea bargain had been agreed upon by the state prosecuting attorney and appellant's then retained counsel, Robert Williams, after several conferences. The essence of the plea bargain was that upon a plea of guilty the State would recommend a 15-year sentence with 10 years suspended.

The State record discloses that at the time appellant appeared in court for the purpose of changing his plea from not guilty to guilty, his secretary interrupted the proceedings by volunteering that in her opinion appellant

[1]The Honorable Paul X. Williams, Chief Judge, Western District of Arkansas. Opinion reported at 394 F. Supp. 1219 (W.D. Ark. 1975).

was too ill to be aware of the consequences of his action. She also produced a letter from a doctor concerning appellant's condition. After further inquiry the court decided not to proceed and made arrangements for a later hearing with respect to appellant's mental competency.

Subsequently appellant was found competent to stand trial. He proceeded to trial with other retained counsel and raised the defense of insanity at the time of the commission of the alleged offenses of embezzlement. During the prosecution's case in chief the disputed confession was offered in evidence. After conducting a *Jackson v. Denno* hearing, the state trial court found the statement made by appellant was voluntary and admitted the same. After the Arkansas Supreme Court affirmed, certiorari was sought and denied by the United States Supreme Court. The petition for habeas corpus was then filed in district court, and the court conducted a hearing which included the taking of the testimony of appellant's former counsel, Robert Williams. The district court found that appellant was given the appropriate *Miranda* warnings and found that appellant "has proved no violation of any rights he has under the constitution and laws * * * of the United States." 394 F. Supp. at 1223.

The appellant's principal contention is that he was induced to make the statement (confession) as a result of a plea bargain made by his then counsel of record. He urges that the fact that at a subsequent hearing he failed to withdraw his plea of not guilty and exercised his right to stand trial "completely obliterates the voluntariness of the confession and thereby makes it inadmissible at the subsequent trial." Appellee, on the other hand, contends that appellant's own words which appeared in the confession given under oath acknowledge that he had not been promised

anything by anyone for making the statement and that the same was a free and voluntary statement. The appearance of these words in the confession is not disputed. But that is not the end of the problem.

It is undisputed that a plea bargain had been made by counsel and that appellant, after being fully apprised of the terms thereof, agreed to enter a plea of guilty. Thereafter the prosecution requested through appellant's attorney that appellant give a statement as to what actually occurred and how he took the money and used it.[2] The confession was given by appellant in the presence of his counsel and other witnesses.

Appellant's counsel, Williams, testified at both the state *Jackson v. Denno,* hearing and in the federal district court hearing that he would not have advised appellant to make a statement or give a confession if there had not been a plea bargain agreement. It was the view of the Arkansas court and the district court that counsel's hindsight did not affect the voluntariness of the confession. *See* 514 S.W.2d at 411; 394 F. Supp. at 1222. We are not so persuaded.

Conceding arguendo that the confession was not an express precondition of the plea bargain, it nevertheless was made in connection with an offer to plead guilty and after a bargain had been agreed upon. It is obvious that no such confession would have been made at the request of the

[2]Excerpt of the testimony before the federal district court by appellant's attorney, Williams, is as follows:

Q. Did the prosecuting attorney insist on this statement?

A. If you are using the word "insist" in just its common context, yes. He told me several times that he wanted this statement. He insisted to me. If you are talking about a more technical way of thinking about the word "insist" that he refused to go ahead unless it was given, no.

prosecution but for the plea bargain. It became a part and parcel thereof.

In a recent case we recognized the importance of confidentiality in plea bargaining.

> Plea bargaining has been recognized as an essential component of the administration of justice. "Properly administered, it is to be encouraged." *Santobello v. New York,* 404 U.S. 257 (1971). If such a policy is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful. Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence. *United States v. Verdoorn,* No. 75-1644 (8th Cir., Jan. 13, 1975), Slip Opinion at 7.

Further, plea bargaining and the inadmissibility of offers of pleas and related statements have been sanctioned by recent amendments to the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 11(e)(6) (effective August 1, 1975) provides:

> *Inadmissibility of Pleas, Offers of Pleas, and Related Statements.* Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

The Federal Rules of Criminal Procedure, of course, are not binding on the states.[3] The issue here is the voluntariness of appellant's confession under federal standards. *Malloy v. Hogan,* 378 U.S. 1 (1963); *Bram v. United States,* 168 U.S. 532, 542 (1897); *Hunter v. Swenson,* 442 F. 2d 625, 630 (8th Cir. 1971).

> Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any *direct or implied promises, however slight,* nor by the exertion of any improper influence . . ."

Malloy v. Hogan, supra, 378 U.S. at 7 (emphasis added).

Similarly, "evidence of guilt induced from a person under a governmental promise of immunity" must be excluded under the self-incrimination clause. *Shotwell Mfg. Co. v. United States,* 371 U.S. 341, 347 (1963). The issue of voluntariness "necessarily turns on the 'totality of the circumstances.' " *Boulden v. Holman,* 394 U.S. 478, 480 (1969). *See also Haynes v. United States,* 373 U.S. 503, 512 (1963).

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[3] See ABA Standards Relating to Pleas of Guilty, Sections 2.2, 3.4 (Approved Draft 1968).

We recognize that the state court's findings are entitled to a presumption of correctness with the burden on appellant to establish by convincing evidence that the factual determination by the state court was erronous. *LaVallee v. Delle Rose,* 410 U.S. 690 (1973); 28 U.S.C. §2254. The district court having held a hearing, its findings must prevail unless found to be clearly erroneous. Fed. R. Civ. P. 52. We must determine whether appellant's confession "was involuntary and inadmissible as a matter of law." *Swenson v. Stidham,* 409 U.S. 224, 231 (1972). There is little dispute as to the basic facts. Our concern is with the failure of the state and district courts to recognize that the confession was given as a result of a plea bargain and was therefore involuntary under all the circumstances. It is our conclusion that, since the plea bargain was not executed, the confession was involuntary and inadmissible. *Cf. Hunter v. Swenson,* 504 F. 2d 1104 (8th Cir. 1974).

The judgment of the district court denying the petition for writ of habeas corpus is vacated and this cause is remanded for entry of orders consistent with this opinion. The State should be allowed a reasonable time in which to retry appellant if it desires to do so.

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VS.

ANDREW JACKSON ROSS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX B

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX B

JEFF MOBLEY, EX REL.
ANDREW JACKSON ROSS ..... *Petitioner*

VS.

DONALD L. MEEK, SHERIFF OF
JOHNSON COUNTY, APKANSAS ..... *Respondent*

UNITED STATES DISTRICT COURT
W. D. Arkansas
Fort Smith Division
May 23, 1975

OPINION

PAUL X. WILLIAMS, *Chief Judge*

On May 5, 1975 a Petition in behalf of Andrew Jackson Ross was filed in this Court under provisions of 28 U.S.C. §2254 and a transcript of the proceedings in the Arkansas Courts (consisting of 2 volumes) was lodged with this Court at the same time.

Based upon the instruments filed, this Court issued a stay order and directions for a speedy trial.

On May 12, 1975 Respondents filed Answer and admitted that all State remedies had been exhausted and the Court set the matter for hearing at Fayetteville, Arkansas on May 15, 1975.

On May 15, 1975 Hearing on Merits was held at which oral evidence was presented. At the conclusion of all evidence, arguments were presentd orally. At the conclusion of the arguments the Court took the matter under advisement and granted five (5) days for each side to simultaneously file written briefs.

On May 21, 1975 Petitioner filed an amended Petition, setting forth in writing grounds already orally argued.

Times for briefing having expired, the matter is ready for determination.

The facts which constitute the procedural background of this matter are not in dispute: Andrew Jackson Ross was convicted in the Circuit Court of Johnson County, Arkansas and sentenced to twenty-one (21) years in the Arkansas Department of Correction. He appealed to the Supreme Court of Arkansas which affirmed in a case reported at 257

Ark. 44, 514 S.W.2d 409. Application to the U. S. Supreme Court for certiorari was heard and denied by the United States Supreme Court. It is alleged and conceded that all State remedies are exhausted and Petitioner prays for relief under 28 U.S.C. §2254.

28 U.S.C. §2254 provides that a district court shall entertain an application for a writ of habeas corpus in behalf of a person in state custody only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Section (b) requires that state remedies be exhausted or circumstances shown that any further state proceedings are rendered ineffective. It is conceded by respondents that there are no additional effective remedies available to the Petitioner and the Court finds such to be true.

The Court further finds that requirements of Section (c) have been met and the questions Petitioner raises have each been finally adjudged against him by the Courts of the State of Arkansas.

Since there is a written opinion of the Arkansas Supreme Court, under 28 U.S.C. §2254(d), each finding is presumed to be correct unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —

1. That the merits of the factual dispute were not resolved in the State Court hearing;

(This Court finds that the merits of the factual dispute were resolved in the State Courts.)

2. That the fact finding procedure employed by the State Court was not adequate to afford a full and fair hearing;

(In this case the Court finds that the Arkansas Court fact finding procedure was adequate and did constitute a full and fair hearing.)

3. That the material facts were not adequately developed at the State Court hearing;

(Here the Court finds that the material facts were adequately developed at the State Court hearing.)

4. That the State Court lacked jurisdiction of the subject matter or over the person of the applicant;

(Here there is no question of jurisdiction either over the person or the subject matter.)

5. That the applicant was indigent and State Court failed to appoint counsel;

(Here the applicant has had and still has the services of very able attorneys and counsel who have been diligent in his behalf.)

6. That the applicant did not receive a full, fair and adequate hearing;

(Here the applicant did receive a full, fair and adequate hearing.)

7. That the applicant was otherwise denied due process in the State proceeding;

(Here the applicant contends that he was deprived of due process, but the facts reveal no lack of due process. He was notified and made aware of his rights under the law. He was represented by able counsel.)

8. Or unless the record of the State Court proceeding or the proof adduced at the hearing reveals that

the factual determination by the State Court is not fairly supported by the record.

(1) Here the Court finds that the record reveals a complete presentation, good and adequate representation by counsel, a complete consideration by the State tribunals, a valid conviction by the Circuit Court, an affirmance by the Arkansas Supreme Court and denial of certiorari by the United States Supreme Court.

Section (d) further provides that the burden of proof is on the Petitioner unless the fact is admitted or the Court under (8) above finds that the record as a whole does not fairly support the factual determination. Here the Petitioner has clearly failed to meet the burden of proof placed upon him by the Statute.

Sections (e) and (f) deal with the matter of presenting the truth to the Court regardless of his financial status or ability of Petitioner.

The Court finds that the transcript of the State Court proceedings is before the Court and clearly indicates that due process has been afforded Petitioner throughout all court proceedings.

(2) The Court notes the nunc pro tunc amendment to the application. This was permitted because Petitioner's counsel urged in oral argument that letting a Justice of Peace serve as a Juror was error rising to the standard requiring habeas corpus relief under §2254.

This proposition was directly presented to the Arkansas Supreme Court and passed on by that Court. Chief Justice Harris writing for a unanimous Court disposed of Petitioner's contention in the following language: 257 Ark. 44, 514 S.W.2d 409.

"Finally, it is asserted that the trial court erred in refusing to declare a mistrial when the appellant discovered a member of the jury was a justice of the peace. Formerly, by statute (Ark. Stat. Ann. §39-230 (Repl. 1962)), a justice of the peace could be peremptorily challenged, but such statute was repealed by Section 30 of Act 568 of 1969. Of course, there was no statutory disqualification even to begin with, and the juror was not challenged on voir dire; nor is there any indication that his presence as a member of the jury prejudiced the rights of the appellant. Under these circumstances, there was no abuse of discretion in refusing to declare a mistrial."

Petitioner claims that a statement he gave to the Prosecutor should not have been introduced against him at his trial.

At the time Petitioner made the statement he was represented by Hon. Robert Hays Williams, a very able and experienced attorney. Mr. Williams testified in this Court that he had reached a plea bargain agreement with the Prosecuting Attorney two or three weeks prior to the giving of the confession and that the Petitioner agreed to the terms of the plea bargain. Mr. Williams also testified that subsequent to the plea bargaining the Prosecutor asked if the Petitioner would make a statement concerning the crimes. After Mr. Williams advised the Petitioner that he did not have to make the statement and of his privilege against self-incrimination the Petitioner agreed to make a statement.

The record discloses that the statement was made in the office of Mr. Williams, his then attorney, (privately employed) with him present to advise the Petitioner.

Billy J. Baker of the Arkansas State Police testified that prior to the Petitioner giving his statement on October 6, 1972, he read the standard Miranda warnings to the Petitioner.

On page 570 of the state court transcript the following answers were given by the Petitioner while under oath at the time of making his confession:

Q. Have I promised you anything for this statement?

A. No, sir.

Q. Has anyone told you that anything has been promised in return for you making this statement?

A. Absolutely not.

Q. This is a free and voluntary statement?

A. Right.

Q. You haven't been coerced into making it?

A. No, sir.

Q. And you haven't been promised anything by anybody in return for making it?

A. That's right.

* * *

In *Hughes v. Swenson*, 452 F. 2d 866-68 (8th Cir. 1971) in reviewing the question of whether a confession was properly admitted in a state trial the court stated the test at the time of trial is: "has the prosecution sustained its heavy burden of demonstrating that the defendant was effectively advised of his rights, and did he knowingly and understandingly decline to exercise them?"

The record discloses that no illegal act on the part of the state induced the Petitioner to give his confession. The Petitioner himself while under oath stated that the confession was given of his own free will. (Tr. 570) The confession was given with counsel present and after having been given the required Miranda warning.

(3) The Petitioner has not produced any evidence to show that the statement was not voluntarily given after having been properly advised of his right against self-incrimination and freely declining to exercise it.

The Petitioner's confession was found by the trial court to have been freely and voluntarily given pursuant to a *Denno* hearing and written findings therefrom as well as by the Arkansas Supreme Court in appellate review. These findings were made on the basis of the totality of the circumstances. *Boulden v. Holman,* 394 U.S. 478, 89 S. Ct. 1138, 16 L. Ed. 2d 433 (1969); *Davis v. North Carolina,* 384 U.S. 907, 86 S. Ct. 1344, 16 L. Ed. 2d 360 (1966) *Harris v. State,* 244 Ark. 314, 425 S.W.2d 293 (1968). In the *Denno* hearing, *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), and as required by statute, Ark. Stat. Ann. §43-2105 (Supp. 1973) the trial court found from a preponderance of the evidence that there were neither promises of leniency nor any manner of coercion that vitiated the voluntariness of the confession.

(4) Petitioner, however, construed the confession as violative of his Fifth Amendment Right under the United States Constitution not to be a witness against himself, i.e., the right against self-incrimination. This right, however, is subject to being waived under ". . . procedural safeguards effective to secure the privilege against self-incrimination," and ". . . to insure that the statements were truly the product of free choice." *Miranda v. Arizona,* 384 U.S. 436, 444, 457, 86 S. Ct. 1602, 1619, 16 L. Ed. 2d 694 (1966). There is no question that Petitioner was apprised of these required Miranda warnings.

This case would likely have been disposed of at the hearing before trial Judge Enfield except for the precautions he took to insure that all of the defendant's rights were scrupulously protected. When it was suggested that Mr. Ross suffered from a lack of mental capacity, Judge Enfield properly committed Mr. Ross to the State Hospital for examination and evaluation.

At the trial the jury considered the defense based on lack of mental capacity and the Arkansas Supreme Court discussed that defense and after consideration ruled against Mr. Ross.

(5) Petitioner's attorneys now urge that §2254 relief should be available because Hon. Robert Hays Williams said that had he known how it was going to turn out he would not have permitted his client to make a statement. Conceding the wise after view of such able and distinguished counsel the answer is that we cannot try cases on what attorneys would have done "IF" — we must accept the facts as established and try to reach a just result based on the record. Here, the Petitioner, after proper warnings, did make a statement and it was properly placed in evidence. The truth is that "if" Petitioner had followed the advice of Mr. Williams and the trial court had gone along with the plea bargain, Petitioner would now have his sentence practically served. But again we are not dealing with the "ifs". We have only the facts.

Petitioner has been afforded due process at all stages of his trial and this Court finds that he has proved no violation of any rights he has under the constitution and laws and treaties of the United States.

The stay order of this Court should be dismissed, the Petition of Mr. Ross in this Court should be dismissed and the State Authorities notified of the action of this Court.

Supreme Court, U. S.
FILED
JUN 28 1976

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1726

TERRELL DON HUTTO, Commissioner,
Arkansas Department of Correction,
Petitioner,

v.

ANDREW JACKSON ROSS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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OPINIONS BELOW

The Opinion of the Eighth Circuit is reported at 531 F. 2d 924 and is reprinted in the Appendix. The Opinion of the District Court is reported at 394 F. Supp. 1219 (1975). The Opinion of the Arkansas Supreme Court is reported at 514 SW 2d 409 (Ark. 1974).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the record supports the determination of the Eighth Circuit that the respondent's confession was involuntary and inadmissible as a matter of law?

STATEMENT OF THE CASE

Respondent takes issue with parts of the petitioner's statement of the case and thus presents a statement of the case in an attempt to correct inaccuracies and omissions.

The respondent, Andrew Jackson Ross, was charged on March 14, 1972, in an 86-count information with converting, using, and embezzling public funds in Pope County, Arkansas.

In September, 1972, the respondent, his attorney Mr. Robert Hays Williams, and the prosecuting attorney for the Fifth Judicial District, Mr. Alex G. Streett, struck a plea bargain whereby respondent would enter a plea of guilty to all charges and Mr. Streett would recommend to the Court a sentence of fifteen years, with ten years suspended. Subsequently, Mr. Streett approached Mr. Williams and asked if he could obtain a statement concerning the crime from the respondent. The stated reason for obtaining the statement was to complete Mr. Streett's file.

On October 6, 1972, at the office of Mr. Williams, the respondent gave a detailed statement in response to questions from Mr. Streett covering 34 pages. (S.T. 537-571) The respondent

attended this arduous session, leaving hospital confinement against the advice of his doctor, and on two occasions asked that he be allowed to return to the hospital. (S.T. 558-559)

On October 9, 1972, the respondent appeared before the Honorable W. H. Enfield in the Circuit Court of Pope County, Arkansas, for the purpose of entering a negotiated plea. The proceeding was interrupted, however, by the respondent's former secretary, Mrs. Rosilee Mertz. She stated to the Court that the respondent had been ill and under a doctor's care for approximately one year and did not know what he was doing by pleading guilty. (S.T. 42, 43) Judge Enfield, after a brief hearing, committed the respondent to the Arkansas State Hospital for examination and observation. Between October 9, 1972, and August 27, 1973, the respondent changed counsel. At the time of the trial, he was represented by Mr. Jeff Mobley and Mr. William Murphy. Prior to the August 27, 1973, trial, the issue of competence to stand trial was raised and the respondent was again institutionalized and examined. During the trial, which commenced on August 27, 1973, the respondent's full statement was read into the record over the objection of respondent's counsel.

The respondent was convicted and sentenced to a 21-year term of imprisonment. The Arkansas Supreme Court affirmed the judgment in *Ross v. State*, 257 Ark. 44, 514 S.W. 2d 409 (1974).

The respondent filed a petition for Writ of Habeas Corpus in the United States District Court for the Western District of Arkansas, Ft. Smith Division, on May 5, 1975. After hearing, the court issued its opinion and order denying the writ on May 23, 1975. The Eighth Circuit reversed that decision on March 16, 1976.

ARGUMENT

The Court of Appeals in finding that the confession of the respondent was given as a result of a plea bargain and was therefore involuntary under all the circumstances was reached under existing precedent. *Swenson v. Stidham*, 409 U.S. 224 (1972); *Malloy v. Hogan*, 378 U.S. 1 (1963); *Hunter v. Swenson*, 442 F. 2d 625 (8th Cir. 1971). The Eighth Circuit did not depart from existing precedent. As the Court of Appeals found, there is little dispute as to the basic facts in this case, although the petitioner attempts to again argue the facts in his statement of the case and argument.

The Court of Appeals' decision does not conflict with applicable decisions of this Court or with decisions of any other circuit. The Court of Appeals was convinced that the factual determination by the state court was clearly erroneous in that the confession was given as a result of the plea bargain. The court was therefore left with no choice but to find that the confession was involuntary and inadmissible.

CONCLUSION

For the above reasons, a writ of certiorari should be denied.

Respectfully submitted

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Certification of Service

I, Henry L. Jones, Jr., hereby certify that three copies of the foregoing Brief in Opposition to Certiorari was served upon opposing counsel, Attorney General Jim Guy Tucker, State of Arkansas, Justice Building, Little Rock, Arkansas 72201.

Henry L. Jones, Jr.